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1945  
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 787 39

INTERNATIONAL LADIES' GARMENT WORKERS  
UNION,

*Petitioner,*

DONNELLY GARMENT COMPANY, DONNELLY GAR-  
MENT WORKERS' UNION AND NATIONAL LABOR  
RELATIONS BOARD

PETITIONER'S REPLY BRIEF

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1945**

**No. 787**

**INTERNATIONAL LADIES' GARMENT WORKERS'  
UNION,**

*vs.*

*Petitioner,*

**DONNELLY GARMENT COMPANY, DONNELLY GAR-  
MENT WORKERS' UNION AND NATIONAL LABOR  
RELATIONS BOARD**

**REPLY BRIEF OF INTERNATIONAL LADIES' GAR-  
MENT WORKERS UNION PURSUANT TO PARA-  
GRAPH 4(a), RULE 38.**

NOTE: The petitioner International Ladies' Garment Workers Union is called the International Union; Donnelly Garment Company is called the Company; Donnelly Garment Workers' Union is called the Company Union. In this case 787, the International Union is sole petitioner; the Company and the Company Union, being the respondents, have filed separate briefs in opposition to the issuance of the Writ. This brief is intended as a joint reply to both thereof.

**Statement**

Respondents challenge the petitioner's statement that factually the record supports the Board's finding.

**Factually the Record Supports the Board's Finding. Petitioner's Statement to That Effect (Petitioner's Brief 10) Is Not, as Charged, a Misstatement. (Company's Brief 4-5, Company Union's Brief 5.)**

Petitioner's statement ("Factually the record supports the Board's findings. This is conceded by the Opinion") is a true statement of the record. The majority opinion states that there are two pictures, one showing unfair labor practice and the other the contrary (XIII-37). Manifestly these pictures came neither from fancy nor shadow, but from the evidence, and necessarily evidence showing the first picture supports the finding. No other conclusion from the Court's language is possible.

Counsel pervert the Court's language ("The question of which is the true picture insofar as that presents a question of fact, is not a matter with which this Court can concern itself") into meaning that the Court, in its opinion, not only did not, but could not concern itself with whether there was sufficient evidence to support the finding of unfair labor practice. Say counsel, "The Court below, in its majority opinion, expressly refused to pass upon the question whether the Board's findings were supported by the evidence" (XIII-37). That is to say, that the Court expressly refused to decide the only question it was authorized to decide under the provisions of the National Labor Relations Act, paragraphs (e) and (f) Section 160. *Reductio ad absurdum.*

What the Court could not do, and was saying it could not do, was that, having decided that there was sufficient evidence to support the picture of unfair labor practice, the Court could not concern itself with countervailing evidence, for the manifest reason that such course would be weighing conflicting evidence.

We therefore submit that all questions in this case must be viewed against the background that factually the record,

and for that matter the opinion of the Court below, supports the finding.

#### POINT ONE,

Petitioner's point one is that: *In a case where admittedly the Board's finding is supported by evidence*, the Court has undertaken to weigh and fix the probative value of given evidence (the Employees' testimony) and to set aside the Board's finding, not because of refusal to admit such evidence, but because the Board did not give the consideration and weight to such evidence that the Court, in its judgment, believed it entitled to have.

The Respondent's answer is twofold:

(a) That this is not a case where, admittedly or otherwise, the finding of the Board is supported by substantial evidence. That the Court did not so find or decide, but expressly refused so to do—"The Court below in its majority opinion expressly refused to pass upon the question whether the Board's findings were supported by the evidence; \* \* \*" (Company brief 2-3).

(b) The Board arbitrarily disregarded the Employees' testimony; refused to consider it; or weigh it or to put it "on the scales" for any purpose (Company brief 4-5, Company Union brief 2-4), hence the Court did not weigh the evidence but merely afforded the parties due process of law.

**Both the Examiner and the Board Received, Considered  
and Weighed the Employees' Testimony**

**A**

The Examiner and the Board obeyed the Court's direction and *did receive the employees' testimony*,

The *Trial Examiner* in his report stated:

"The undersigned accorded the respondent and the D. G. W. U. an opportunity to introduce all of the competent and material evidence which was rejected at the prior hearing \* \* \*." (Volume X, 3848)

The *Board's final report* recites:

"In remanding the case to the Board for further hearing the Circuit Court directed that the respondent and the D. G. W. U. be permitted to adduce the previously proffered testimony of respondent's employees to show, in substance, that they form the union and the D. G. W. U., of their own free will and that they were not influenced, interfered with, or coerced by the respondent in choosing that organization as their bargaining representative. In compliance with the Court's mandate and pursuant to the respective offers of proof, submitted by the respondent and the D. G. W. U. at the original hearing, the Board permitted the introduction of such testimony." (Vol. X, 618-619. See also Vol. XIII, 25.)

The *Court below* declared and held that such testimony (the testimony of the employees) had been received in accordance with the Court's previous mandate and that there was no error in receiving, rejecting or otherwise ruling in relation thereto (Vol. XIII, 7, 8, 40, 41). That such testimony was received is beyond cavil.

## B.

The Trial Examiner and the Board *considered* such testimony.

The Trial Examiner considered such evidence. The Trial Examiner reported:

"The undersigned accorded the respondent and the D. G. W. U. an opportunity to introduce all of the Competent and material evidence which was rejected at the prior hearing. \* \* \* Upon the record thus made (manifestly including the Employees' testimony which the Examiner in the second preceding sentence stated that he had received), and from his observation of the witnesses, the undersigned makes, in addition to the foregoing the following findings of fact." (Vol. X, 3848).

The Board's finding recites:

"In compliance with the Court's mandate and pursuant to the respective offers of proof submitted by the respondent and the D. G. W. U. at the original hearing the Board permitted the introduction of such testimony (Employees' testimony), we have carefully considered all such evidence adduced by the respondent and the D. G. W. U." (Vol. A. 618-619).

## C.

The Board *weighed* the Employees' testimony.

Counsel and the Court assert and reassert, proclaim and proclaim again that the Board did not *weigh* the Employees' testimony, but arbitrarily disregarded it, did not put it "on the scales", treated it as if it were not in the case. This is the basis for the assertion that thus, therein and thereby the Board denied the parties due process of law. We were astounded at the pristine assertion that the Board had not weighed such evidence and at each reassertion we have re-examined the record and can find no sub-

stance in Respondent's assertion or justification therefor. Our conception of weighing is to compare by the balance, to ascertain the weight of, *or lack of weight of*, a substance. To weigh is a transitive verb and it means the ascertainment of lack of weight as much as it means ascertaining its presence. The fact that upon trial by balance a thing is discovered to be without weight does not mean that such process is not a weighing. A thing can be weighed and found wanting.

"Tekel; Thou art weighed in the balances, and art found wanting." 5 Daniel 27.

Manifestly the Board did weigh the Employees' testimony. While the Board does not expressly use the word weigh, yet it describes what it did and what it did, past all cavil, was weighing.

"We have carefully considered all such evidence (Employees' testimony) adduced by the respondent and the D. G. W. U. We find, however that the testimony in question (Employees' testimony) does not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the D. G. W. U., which subjected that organization to the respondent's domination and which thus removed from the Employees' selection of the D. G. W. U. in complete freedom of choice which the Act contemplates." (Vol. 13, 25-26).

That is to say, the Board did consider the Employees' testimony and did balance it against other evidence and did find that the Employees' evidence did not, in the opinion of the Board, overcome more positive evidence to the contrary. If that be not weighing, then there has been a strange misconception of the meaning of the word from the days of Daniel, through the King James' version, to the present time.

We submit that upon final analysis it becomes exceedingly clear that the complaint by respondent and the decision by the Court are not, and cannot be, based on failure by the Board to weigh evidence, but upon failure by the Board to give to conflicting evidence the weight which respondent and the Court believe it should have. Such contention assumes the Court can itself weigh conflicting evidence. No decision, expressly or by implication, extending such authority to the Court, can or should stand. It is contrary to the express wording of the Act and to many decisions of this Court and the Courts of Appeal.

## D

**The Board's Declaration That It Did Receive, Consider and Weigh the Employees' Testimony Must Be Taken as Final**

Where does the respondent's assertion that the Board did not consider or weigh, but did arbitrarily disregard this evidence, lead? The Board expressly and officially declares that it did consider and by unmistakable implication it did weigh such evidence. These things deal with mental and subjective processes and the Board alone knows what those processes were. (*Morgan v. U. S.*, 304 U. S. 1, 58 S. Ct. 773.). There is no room for mistake. Either the Board did, as by it declared, consider and weigh and did not arbitrarily disregard this evidence, or the Board officially states that which it knows not to be true. One who undertakes to prove such a charge against the Board carries a heavy load.

Judge Sanborn's opinion states:

"It is contended that it appears from the record that the Trial Examiner and the Board had prejudged the case and were determined to convict the company in all events, disregarding its testimony, whenever necessary, to make a finding favorable to

the Board. In order to sustain a ruling to that effect it seems to us that it would be necessary to be able to demonstrate from the record to a moral certainty the existence of such a mental state. The presumption is the other way." (Vol. XIII, 40.)

Here the record demonstrates to a moral certainty exactly the opposite of respondent's contention.

### E

#### **Calling the Action of the Board, in Weighing Evidence and Discarding Some Thereof as Without Value, Arbitrary, Merely Begg the Question**

Counsel criticize our statement: "Even if the Board is ~~compelled~~ to receive material evidence, what it does with such evidence ~~as~~ received, is not subject to judicial review"; counsel saying, petitioner's position means that the Board may "arbitrarily disregard material evidence." (Company brief 4; Company Union brief 2).

Our expression may not be entirely fortunate. The use of the word "arbitrary" is a linguistic trick since no one wants to concede that his position is arbitrary. However, we think our position is fairly clear. Our submission is that *assuming* there is evidence to support the finding, the Board is the *sole* judge of the weight or probative value *or lack thereof* of any given evidence. Always *assuming* there is evidence to support the finding, sole authority to weigh the evidence is authority to determine after consideration that given evidence in a given case is without weight, and should be disregarded. The Court, under the Act, is without jurisdiction to inquire into the mental processes of the Board, which caused the Board to determine that given evidence was without weight, was not believed, would be disregarded. (Morgan vs. United States, 304 U. S. 1, 58 S. Ct. 773.) The Court may not set aside a finding be-

cause the Court believes that the Board's reason for holding given evidence without weight was not justified. For the Court so to do would be for the Court to do a forbidden thing, which is weigh conflicting evidence. (National Labor Relations Act, paragraphs (e) and (f), Section 160.)

Calling the action of the Board "arbitrary" in refusing to give weight to given material evidence; asserting that the Board "may not arbitrarily disregard material evidence", is only an indirect way of asserting that which is not true, which truth is that the Board is the sole judge of the credibility of the witnesses and the weight, if any, to be attached to their testimony. No matter how it is expressed or what epithet is used, respondent's position means that the Court may substitute its judgment for the Board's in saying whether given evidence is to be given much weight, little weight or no weight.

Who is to determine whether the Board's action in determining the weight of evidence is or is not arbitrary? If the Court is so to determine, then by what standard is the Court to decide the Board's action arbitrary or not arbitrary? Manifestly the standard would have to be the Court's judgment as to whether the given evidence was or was not entitled to *some* weight. But this completes the circle, brings it back to the point of beginning, and is directly in contradiction to admitted law that the Board is the sole judge of the weight, if any, of evidence, and into that field the Court may not enter all the way or any part of the way. He who decides whether the Board's action in weighing evidence is arbitrary or not arbitrary is himself weighing evidence, is exercising an authority the Board alone has and the Court has not under the Act.

### **The Use of the Word "Immaterial" in the Board's Finding**

An inordinate to-do is made by respondents over the use of the word "immaterial" in the Board's finding, as if its

use destroyed all else the Board stated and declared and found. Counsel hang desperately to the word "immaterial" and contend that its use poisons the whole finding and renders the whole proceeding void, because of lack of due process. This contention entirely overlooks the indisputable fact that before, and entirely independent of the sentence in which the word "immaterial" occurs, the Board had received, considered and weighed all of the evidence and found that the employees' testimony did not overcome more positive evidence in the record that the company was guilty of unfair labor practice.

"We have carefully considered all such evidence (Employees' testimony) adduced by the respondent and the D. G. W. U. We find, however, that the testimony in question does not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the D. G. W. U. which subjected that organization to the respondents' (the company) domination, and which removed from the employees selection of the D. G. W. U., the complete freedom of choice which the Act contemplates". Vol. X, 2526.

It is after such finding, and purely supplemental thereto in an independent sentence, that the word "immaterial" is found. The Board then states "Since we find the testimony here adduced totally unpersuasive", that is, having already found the testimony unpersuasive, when viewed against the whole record, the Board adds the further and additional consideration that its experience in administration of the Act caused it to conclude the *conclusionary evidence* of this nature was immaterial to *issues such as those presented in this case*. Manifestly the Board did not mean, by the use of this word, to indicate that such testimony should not be received, considered and weighed in light of the entire record, because that is precisely what the Board had already

done. It may well be that this is a loose use of the word immaterial, but it cannot be tortured into meaning that the Board did not and would not receive, consider and weigh such evidence but arbitrarily disregard it. If, instead of using the word immaterial, the Board had said that its experience demonstrated that such evidence, when *viewed in light of an entire record*, was not persuasive, or was of little value, or even of no value, such language would mean nothing more than that used by the Board, and the entire base of respondent's argument would be gone.

**The Case of NLRB v. Indiana and Michigan Electric Company, 318 U. S. 9, 63 S. Ct. 394**

This case is used by respondents primarily in support of their contention that there was denial of due process because it is alleged the Board excluded four items of evidence (accurately described in the petition of NLRB for certiorari in case 786, pages 3 and 4). The Indiana case is quite accurately analyzed by the NLRB counsel in its petition, pages 44, 45, 46 and 47. The following may be added.

The *Indiana* case was decided upon a petition to the court to remand the case to the Board to hear additional evidence, under the express provision of paragraph (e), Section 160, Title 29 U. S. C. A.—providing that either party may apply to the court for leave to adduce additional evidence. That proceeding, so far as the Supreme Court was concerned, was not to enforce or set aside an order of the Board pursuant to statutory jurisdiction, nor was it to set it aside because it denied to the parties due process of law. The granting or refusing of a petition to take additional evidence resides largely in the discretion of the court (318 U. S. 1 c. 27, 63 S. Ct. 1 c. 404). This proceeding was not to hear additional evidence, nor was any order made as to adducing further evidence. The proceeding was leveled at the validity of the

Board's order. The Court held the order void (Vol. XIII, 71). A proceeding for an order to adduce additional evidence is a far different thing from a proceeding to set aside an order of the Board—questions of jurisdiction and authority are different. The general statements in the *Indiana* opinion are to be construed and confined, by the character of the facts, and nature of the proceeding in that case, when attempt is made to apply such statements to the case at bar.

Not only were the proceedings distinct and different, but the facts in the two cases are entirely dissimilar, not having even general likeness. In the *Indiana* case the excluded evidence, which the court directed should be received, disclosed dynamiting and other violence, threats, intimidations resulting in witnesses refusing to testify or to commit perjury, and a general condition of lawlessness, all calculated and intended to influence the witnesses, the Examiner and the Board. Nothing comparable to that exists in this record. See NLRB petition in No. 786, page 24 and following. The Supreme Court in the *Indiana* case said:

“Dynamiting or display of force by either party has no place in the procedures which lead to reasoned judgments. The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry.” 318 U. S. l. c. 29.

The evidence in question here was not offered upon any such theory. The lower court, in the first decision, held that this identical testimony was not admissible. The court there said:

“We are of the opinion that the Trial Examiner did not err in confining the issues to those which were

tendered by the complaint filed by the Board. We are satisfied that the Board was not required to try the International for alleged conspiracy, nor to try the charge that the Board had conspired or colluded with the International." 123 Fed. (2d) l. c. 225.

We contend that the rejected evidence would not have been admissible, even in a jury trial, and certainly such rejection would not require a reversal even under the broad jurisdiction of appeal from court to court. See NLRB petition, case No. 786, p. 24 and following. This question is discussed in the next division of this brief.

The point now is that what was said and done in the *Indiana* case is not applicable, much less controlling, here.

## POINT TWO

### A.

**Rejection of the Evidence in Question Would Not Have Been Reversible Error Even in an Ordinary Jury Trial. Much Less Could Such Rejection Be a Denial of Constitutional Due Process of Law.**

*In the first place*, since all rulings rejecting evidence in the first hearing were assigned as error in the first case, the Examiner was warranted, in the second hearing, in assuming: (a) that his rulings with respect to the rejection of evidence, except where condemned, or at least mentioned in the court's opinion, were not erroneous and should be by him followed; (b) that certainly his rejection, in the first hearing, of evidence of alleged illegal conduct of the International (which rejection was expressly approved by the court (125 Fed. (2d) l. c. 225 (15)) was to be adhered to; (c) that he was not to hear any new or additional evidence not within the scope of the remand.

These considerations alone dispose of nearly all complaint concerning rejection of evidence. Moreover the re-

jection of the evidence in question did not constitute reversible error.

*Contracts between the International and other employers said to contain terms less favorable to the employees than the contract between the company and the company union.*

Such testimony was non-receivable because it would lead to endless collateral issues, a practice condemned by all trial courts. Who is to say one long complicated contract is more favorable to one party than another contract of like character between other parties? If one side introduces certain terms claimed to be more favorable, the other would introduce other terms said to counterbalance. The court would be deserting and laying aside the main issue to try endless collateral matters.

Aside from this, the only conceivable value of such evidence would be that it could be argued therefrom that the company employees formed the company union because it could obtain a more favorable contract than from the International. But, even here, the existence of such contracts could not bear upon the motive of the employee unless the employee knew thereof, and then it would not be what was in the contract, but what the employee believed was in it. That is precisely the ruling of the Trial Examiner. He excluded the terms of the collateral contracts, but admitted evidence from the employees as to what they understood were in such contracts and whether they joined the company union because of what they believed. Such ruling of the Examiner's runs through pages of the record. We refer to Volume VII, 2514 and following, and Volume VIII, 2521 and following. For instance, note the following:

"Trial Examiner Batten: I think it is important also to know what information they (the employees) had. I say 'what information they had' not what information was available in somebody's office, Mr. Tyler. What in-

formation did these people have upon which they acted"? Vol. VII, 2514.

"... we should take the testimony of these employees as to what they thought, what motivated them in doing the things they did. I agree with you on that.

"... In other words, it does seem to me that that is the primary purpose for which the court sent it back, to take the testimony of these people, what they thought, why they did these things", Vol. VII, 2318.

The Trial Examiner did receive testimony of the employees as to what they understood and had heard with respect to such contracts and other activities of the International and what effect such information had upon their joining the company union. Volume VII, 2593, 2594, 2929, 2931; Volume IX, 3080.

*Testimony with respect to alleged illegal conduct, fraud and violence on the part of the International.*

This evidence was excluded at the first hearing and its exclusion was expressly approved by the Court of Appeals in the first case (125 Fed. (2d) 1125 (15)). Such testimony was non-receivable because it necessarily led to the trial of collateral issues. Moreover in the second hearing the Examiner did admit testimony on this subject for the only purpose for which it could possibly be relevant, and that was a bearing upon the motive of the employees in joining the company union. Here again actual violence, fraud and other misconduct was not admissible *per se*, but what the employees had experienced or heard and believed was admitted, regardless of whether such information was true or false. (VII, 2566-2568, 2624-2626-2711-2713, 2768-2771, 2788-2848-2851, 2915-2917, 3003-3006, 3046-3049, 3078-3081, 3120-3121, 3169-3171, 4101-4102, 5125-4169, 4173-4175.)

*Evidence that the International, under other contracts with other employers, received as eligible members employees allegedly having duties similar to those of supervisory employees at the Donnelly plant.*

There was testimony that certain employees of the company were supervisory employees, so that their statements and conduct would be binding upon the company. The company claimed these were not supervisory employees, and for the purpose of showing that they were not, the company offered to prove that similar employees in other plants under contracts with the International, were admitted to membership, when they could not have been admitted if they were supervisory employees. Manifestly this was remote and collateral, leading, if it was received, to interminable comparison and inquiry concerning various kinds of employees in other plants; whether the conditions were similar in the various plants, or whether and wherein they differed, and so forth and so on. The rulings of the Examiner are found in Volume VII, 2508-2510; Volume VIII, 2559-2564-2788-2789; Volume IX, 3527; Volume X, 3787-3794.

In addition to this evidence leading to the trial of collateral issues, such evidence was inadmissible because what the International did with respect to other employers and employees could not possibly have material weight with the Board in determining the primary issue of the presence or absence of unfair labor practice by this Company. Respondents treat this case as if it were a suit at law between the International and the Company, wherein the acts and conduct and declaration of the International would be permissible because admissions against interest.

**Evidence Otherwise Admissible May and Often Should Be Excluded Because It Tends to Introduce Collateral Issues Diverting the Attention of the Triers of Fact from the Precise Issues Involved in the Case and Protract the Trial Beyond Reasonable Limits. The Admission or Exclusion of Such Evidence Rests Very Largely in the Discretion of the Trial Judge, Here the Examiner and the Board.**

The foregoing proposition is elementary. The following is a characteristic statement of the law:

• This general rule (admission of all relevant evidence), however, is subject to the important qualification that testimony which does have some tendency to establish a material fact may be rejected by a trial judge, and should be rejected, when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and protract the trial beyond reasonable limits. This limitation of the general rule requiring all relevant testimony to be admitted to which we have last alluded, is not only reasonable in itself, but it is well supported by the authorities. . . .

“It is always a question within the discretion of the trial judge as to how far parties may be permitted to go into collateral issues; such discretion being exercised by a fair consideration whether the evidence is relevant to the issue, its probable effect upon the jury, the likelihood of confusing the issues, and the probable time that will be consumed if such collateral issues are followed to their legitimate ends.” *New England Trust Co. v. Farr*, 57 F. (2d) 103, l. c. 110.

The same principle is announced in 1, *Greenleaf on Evidence*, Section 14 A, 16th Edition, wherein it is called the Doctrine of Collateral Inconvenience; *Schradsky v. Stim-*

son, 76 F. 730, 1. c. 734; *Lock v. C. B. & Q. Railroad Co.*, 281 Mo. 532, 219 S. W. 919, 1. c. 922; *Golden Reward Mining Co. v. Burton*, 97 F. 413, 1. c. 416; *Wentworth v. Smith*, 44 N. H. 419, 82 Am. Dec. 228; *Thompson v. Bowie*, 4 Wall. 463, 471, 18 L. Ed. 423.

We submit the action of the Examiner, approved by the Board, with respect to the evidence in question, was not such an abuse of discretion as to constitute reversible error even in a common law trial, much less a denial of due process of law.

**The Fundamental Question Is Not Whether the Rejected Evidence Was Permissible, Nor Whether Had the Case Been One at Common Law, the Rejection Thereof Would Be Treated as Reversible Error. The Question Here Is Whether the Refusal to Accept Such Rejected Testimony Was a Denial of Due Process of Law.**

Counsel for respondents persist, as did the court, in refusing to recognize the distinction between the principles governing the jurisdiction of the court upon appeal from court to court, on the one hand, and those principles that govern statutory jurisdiction to review Administrative Board orders. (*Federal Communications Commission v. Pottsville*, 308 U. S. 134, 60 S. Ct. 437.) Even at the expense of brevity we should reply.

Beyond question the court exceeded its statutory jurisdiction granted by the Act. The Court has no statutory jurisdiction to review procedural errors, receipt or rejection of evidence, qualification of Examiner or any other question except whether the finding is supported by substantial evidence. The question then necessarily must be, did the Court exceed its inherent jurisdiction to prevent denial of due process of law? Certain principles of administrative law are to be had in mind.

*Distinction between statutory and constitutional jurisdiction in reviewing orders of administrative boards.*

The findings and orders of an administrative board are essentially legislative and there is no judicial review of such orders (aside from the question of due process), except that granted by a statute. Many laws creating boards make no provision for court review and it is not necessary to their validity that they should have. In such cases the sole jurisdiction is the constitutional one.

The order of an administrative board, created by valid law, is inherently legislative and the validity of the order as to its constitutionality is to be tested and tried, precisely the same as if it were a specific legislative act. For instance, the legislature has power to regulate rates of common carriers and it may do so by as direct a statute as one providing that passenger rates shall be 3¢ a mile. For reasons well understood and learnedly discussed in the *Pottsville* case, direct legislative regulatory acts become increasingly impractical, if not impossible. Hence Legislative boards were born. These acts have successfully withstood persistent and skillful attack upon their constitutionality. Such laws have been sustained upon the theory that the act of the board is in itself, under a valid law, the act of the legislature. Instead of enacting that passenger rates shall be 3¢ per mile, the legislature provides that passenger rates shall be reasonable, in accordance with certain fundamental principles and standards contained in the legislative act. Then the administrative board, *acting in strict compliance with the standards fixed by the legislature*, makes an order to fit the facts within a given case. When such board, in proper proceedings and hearing, makes an order that within a given territory passenger rates shall be 3¢ a mile, the situation is precisely as if the

legislature itself had directed such rate. (See authorities hereinafter cited.)

Laws creating administrative boards ordinarily do provide for a limited court review, but the absence of such a provision does not affect the validity of the act, any more than the legislature in enacting a given statute is required to provide for court review of its validity (42 Am. Jur. 665). *The point is*, that no court has any power generally to review a board order, except that granted by statute. Where there is such grant, the review must be strictly confined to the scope of the statute (42 Am. Jur. 669; Annot. 124 A. L. R. 998).

We concede that every American court of general jurisdiction has inherent power to prevent violation of the constitution by common law and equitable process, and this is applicable to orders of administrative boards precisely as it is to legislative acts. But the court, pursuant to such inherent power testing the validity of an order of an administrative board, proceeds precisely as, and with exactly the same limitations, that it would if it were reviewing the constitutionality of a specific legislative act. The principles governing the action of a court in appeal from court to court have no application whatsoever to the inherent jurisdiction of a court to declare either a board order or a legislative act unconstitutional.

The foregoing principles may be taken as established by Court decisions and the law writers. The leading case, of course, is the *Pottsville* case. An extended and learned review and discussion of these principles is found under the title "Public Administrative Law," 42 Am. Jour. 281 and following; a like article by Ralph F. Fuchs in 47 Yale Law Journal 538 (1937); see also the Harriman article, 25 Yale Law Journal 658; Freund, "Cases on Administrative Law," page 3; Professor Frankfurter, now Mr. Justice Frank-

further, 75 *University of Pennsylvania Law Review* 615. The scope of court review of administrative orders is dealt with in 42 *Am. Jur.*, page 601 and following.

The canons guiding the courts in determination of the constitutionality of a legislative act are applicable to assaults upon orders of administrative boards upon the ground that they deny due process of law, and such canons are applicable to and controlling in this case, precisely the same as if it were an attack upon the constitutionality of a specific legislative act. Some of these canons here controlling are as follows:

While undoubtedly a court has judicial authority, in a given case, to declare a legislative act unconstitutional and hence void, yet the task is "a delicate one and only to be entered upon with reluctance and hesitation." Every presumption and intendment is to be indulged in favor of validity. The burden is upon him who attacks the law. The invalidity must be clear and certain: Unless the act is clearly unconstitutional, it will be held valid.

"It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Union Pacific Railroad Co. v. United States*, 99 U. S. 700 (Sinking-Fund Cases).

1 *Coolley's Constitutional Limitations*, 8th edition, page 334; *Champion v. Anes*, 188 U. S. 321, 47 L. Ed. 492, 23 S. Ct. 34; *Jackson v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916D, 931. Any reasonable doubt as to the validity of the act is to be resolved in favor of its validity. *Ogden*

v. *Sanders*, 12 Wheat. 213, 6 L. Ed. 606. It is not sufficient that there be judicial doubt of validity. 1 *Cooley's Constitutional Limitations*, 8th edition, page 371; *Wellington Petitioners*, 16 Pick. 86, opinion by Shaw, Ch. J.; *Heisler v. Thomas*, 260 U. S. 243, 43 S. Ct. 83.

These canons, supported by cloud of authority, are applicable in this case. Before the rejection of proffered evidence can be unconstitutional and void, because of a denial of due process, the rejected evidence must be so clearly admissible, so direct and fundamental, that it transcends mere error; that without such evidence manifestly and clearly the parties cannot have a fair trial. It must be such a part of the party's case that without it there was no real trial. If the question of admission or rejection is reasonably debatable, it cannot be denial of due process. The ruling must not only be wrong, but manifestly wrong, and it must be vital to the merits of the case. The law could not be otherwise, else a court, under the guise of due process, could expand its jurisdiction to review findings and orders of administrative boards coextensive with its general authority and jurisdiction upon appeal. We submit that that is what the lower court has done in this case.

None of the foregoing principles and propositions are submitted as mere error. We recognize that error of itself is not ground for certiorari. The erroneous rulings of the court transcend mere error affecting alone the rights of the parties to this suit, but affecting (erroneous and in conflict with other decisions, we submit) the administration of one of the most important and far-reaching statutes on the books. This is a typical case for certiorari.

### **Points Three and Four**

These Points by Petitioner are that the parties were not deprived of due process of law by the action of the Board in

appointing the same examiner for the second hearing who had conducted the first.

Let it be noted that respondents have not countered the following, asserted by the petitioner (Petitioner's brief, 27, 28, 29).

(a) The Court, both in the first and the second cases, found no actual prejudice on the part of either the Examiner or the Board (123 Fed. 2d 215-219, the first case—also Vol. XIII-40, the second case).<sup>1</sup>

(b) In the second hearing the Examiner in good faith accepted the Court's ruling and did, without erroneous ruling, receive the employees' testimony.

(c) There is nothing in the record to show that the consideration given by the Examiner, of the Employees' evidence, was influenced to any degree by the fact that in the first hearing (before the Court had spoken on the question) he, the Examiner, had refused to receive such evidence and expressed his then opinion that such testimony was immaterial.<sup>2</sup> There is nothing to show that after the ruling in the first case the Examiner prejudged the testimony without weight before he received and reconsidered it. That is to say, there is nothing to show that after the Court's mandate and opinion were received the Examiner did not in good faith reconsider and reweigh such testimony. The fact that the Board, on reconsideration, found the testimony, in light of the entire record, to be without weight,

<sup>1</sup> "We think that it cannot be said that it appears from the record of the proceedings before the Examiner and before the Board, that there was a denial of due process because of bias and prejudice or collusion." (123 Fed. 2d 215-219, also Vol. XIII-7, the first case.)

<sup>2</sup> "We think, however, that a ruling by this Court, that the proceedings of the Board lack due process because of the alleged bias and prejudice against the company and the plant union, is not justified." (Vol. XIII-40, the second case.)

does not mean that the Board prejudged that question before giving honest reconsideration.

*The decisions as to the disqualification of Judges are applicable.*

The decisions of the Supreme Court and of the Courts of Appeal, holding that a judge is not to be disqualified because of his previous rulings in the same or other cases, are applicable here. Respondents say that the ruling as to disqualifications of judges is not applicable because any erroneous rulings by the judge may be corrected on appeal (Company brief 9).

The authority of the Board to correct errors upon the part of the Examiner is far broader than the authority of the Court correcting mistakes upon the part of the judge. The Trial Examiner has no authority to rule finally on anything. The Board may send the case back to the Examiner to take further evidence, to make other and different rulings. So far as the merits of the case are concerned, the report of the Examiner at best is but advisory and may be accepted or rejected or modified by the Board itself. If it be good law that a judge is not to be disqualified because of his previous opinions and rulings, even in the same case, then it is also good law that an examiner is not to be disqualified for such reason.

Respectfully submitted,

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